SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 306.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

JESSE JOHNSON.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

1 United States circuit court of appeals for the second circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
against
JESSE JOHNSON, DEFENDANT IN ERROR.

A decree having been duly made and entered on the 9th day of February, 1895, in the circuit court of the United States for the eastern district of New York, adjudging that there is due from the United States of America, the plaintiff in error, to Jesse Johnson, the defendant in error, the sum of six thousand five hundred dollars, for services, together with disbursements and clerks' fees, amounting in the aggregate to six thousand five hundred and thirteen dollars and ninety-five cents ($6,513.95); and the matter having been duly brought into this court by writ of error taken by the said United States, and having come before this court for a hearing, questions of law arose, as to which this court desires the instruction of the Supreme Court of the United States for their proper decision.

The facts out of which such questions arose are as follows:

1. Said Johnson was and is a citizen of the United States, residing in the city of Brooklyn, in the eastern district of the State of New York; on the 27th day of January, 1890, said Johnson, by and with the

2 consent of the Senate, was duly appointed district attorney of the United States for the eastern district of New York, for the term of four years, subject to the conditions prescribed by law; thereupon, and at about that time, he duly qualified as such district attorney under the appointment aforesaid, and held such office from that time until the year 1894.

2. In the year 1891 said Johnson was employed and directed by the Government of the United States to institute proceedings on behalf of the United States of America for the condemnation of certain lands on Staten Island adjacent to Fort Wadsworth in the said eastern district, for a mortar battery. Such employment was made as follows: At the special written request of the Secretary of War, the Attorney-General instructed said Johnson, in writing, to institute such proceedings on behalf of the United States for the condemnation of such lands; with such written instruction he enclosed a copy of such request from the Secretary of War and stated that he acted agreeably thereto.

Such direction and employment was made and given under special provisions of law. The following statutes have reference to such direction and employment, to wit: The provision as to gun and mortar batteries and the procurement of land or right pertaining thereto, contained in the act of August 18th, 1890 (26th Statutes at Large, 316); and the provision of the act of July 23d, 1892 (27th Statutes at Large, 258), appropriating the sum of $500,000 for the procurement of land or right pertaining thereto for sites, fortification, and seacoast defenses.

3 The provisions of the act of August 18th, 1890, above referred to, are as follows:

"Gun and mortar batteries: For construction of gun and mortar batteries for defence of Boston Harbor, two hundred and thirty-five thousand dollars; New York, seven hundred and twenty-six thousand dollars; San Francisco, two hundred and sixty thousand dollars."

"For the procurement of land or right pertaining thereto, needed for the sight, location, construction, or prosecution of works for fortifications and coast defences, five hundred thousand dollars, or so much thereof as may be necessary, and hereafter the Secretary of War may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings, for the acquirement by condemnation of any land, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications and coast defences, such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: Provided, That when the owner of such land, or rights pertaining thereto, shall fix a price for the same, which in the opinion of the Secretary of War shall be reasonable, he may purchase the same at such price without further delay: Provided further, That the Secretary of War is hereby authorized to accept on behalf of the United States donations of land, or rights pertaining thereto, required for the above-mentioned purposes.

4 "And provided further, That nothing herein contained shall be construed to authorize an expenditure, or to involve the Government in any contracts for the future payment of money, in excess of the sums appropriated therefor."

3. Proceeding under such employment, said Johnson, in the name of and for the Government of the United States, took proceedings for acquiring such lands by condemnation, and so proceeded that decrees of condemnation in favor of the Government of the United States against the owners and persons interested in such lands, respectively, were duly made and entered. For the purpose of carrying on such proceedings of condemnation it was necessary to search and ascertain the titles to such lands, all of which was done by said Johnson, under his employment aforesaid.

4. After such services were rendered said Johnson made and presented two bills against the Government of the United States for such services, and thereupon the Attorney-General approved and allowed such bills—the one at the sum of four thousand dollars ($4,000) and the other at the sum of two thousand five hundred dollars ($2,500).

5. The services rendered as aforesaid, and for which such bills were presented, were worth the sum of four thousand dollars and twenty-five hundred dollars, respectively. All such services were rendered in the year 1892.

6. It has been the custom and usage of the Government of the United States, for many years prior to the year 1892, and for many years

5 prior to the time of the said employment, to pay to district attorneys of the United States for services like, and under employment similar, to that herein, compensation outside of and apart from the annual salary of such district attorneys, as fixed by statute at the sum of two hundred dollars.

7. Said Johnson has received from the Government of the United States for services (other than those hereinbefore mentioned) rendered to the Government of the United States in the year 1892 as district attorney or under employment or directions from the Attorney-General the sum of twenty-two hundred and fifty dollars.

8. In the year 1891 said Johnson had rendered services to the Government of the United States in and about the acquisition of other lands in said district by condemnation proceedings, all of which services were rendered under employments similar to that hereinbefore set forth and in acquiring lands for like purposes.

For such services rendered in the year 1891 said Johnson has been paid by the Government of the United States a sum exceeding six thousand dollars. He has also been paid for other services rendered by him to the Government of the United States in the year 1891 further and additional sums, and the aggregate so paid to him for services rendered in the year 1891 exceeds six thousand dollars by a sum which, together with the amounts paid to him as aforesaid for services rendered in the year 1892, equals the sum of six thousand dollars, and such excess
6 over six thousand dollars exists and appears after crediting and allowing on the sums so received by said Johnson the necessary expenses of his office, including the necessary clerk hire, as audited and allowed to him in the years 1891 and 1892.

9. After such services rendered in the year 1892, and after the said sum of six thousand five hundred dollars had been allowed by the Attorney-General as aforesaid, the accounting and financial officers of the United States caused a warrant on funds appropriated for the War Department to be drawn for the sum of six thousand five hundred dollars and conveyed into the Treasury of the United States. Such warrant was drawn and conveyed as aforesaid against and in payment of the amount which said Johnson for services rendered in the year 1891 had as aforesaid been paid in excess of the maximum fixed by section 835 of the Revised Statutes. Such conveyance and application was made by the Government of the United States, but without the consent of said Johnson, and except as above stated said claim for sixty-five hundred dollars has not been allowed or paid.

10. After such services were rendered as aforesaid in the year 1892, said Johnson duly requested that the amounts so allowed be allowed and paid by the proper officers of the Treasury, but such officers refused to audit or allow such bills or any part of the same except as aforesaid, and refused to allow or pay to the petitioner any part of the same.

7 11. Upon the trial it was admitted as follows:

"It is admitted that in the year 1891 the expense account of the plaintiff Johnson was $1,018.23, which was allowed by the Attorney-General.

"It is further admitted that if the amounts he received for services in obtaining lands in said district (which services are similar in nature, employment, etc., to those here claimed for) are to be computed as a part of the amount limited by section 835 of the Revised Statutes, then he has received in excess of the amount so limited for the year 1891 a sum which, added to the amounts received by him for the year 1892, and which are fees and emoluments referred to by section 835 of the Revised Statutes, equals the sum of $6,000 and the legitimate office expenses of his office.

"And it is further admitted that if the services here rendered and the other similar services stated above are to be accounted as a part of the maximum fixed by section 835 of the Revised Statutes, and if the Government, having paid plaintiff for one year in excess of such maxi-

mum, has the right to recoup, set off, or counterclaim against an amount otherwise due, such overpayment, then (that is, if both propositions are held) plaintiff has no cause of action here."

Upon these facts this court desires information upon the questions of law for their proper decision, namely:

1. Is said Johnson entitled to be paid by the Government of
8 the United States the said sum of six thousand five hundred dollars for the services rendered as aforesaid in the year 1892?

The foregoing question is submitted without reference to the provisions of section 835 of the Revised Statutes, which are referred to in the questions following.

If the foregoing question is answered in the affirmative, then there is presented the further question—

2. Is such compensation to be included in the fees and emoluments of claimant's office within the provisions of sections 834, 835, and 844 of the Revised Statutes?

If both the above questions are answered in the affirmative, then there is presented the further question—

3. Can the Government of the United States, under the circumstances here stated, convey and apply the said sixty-five hundred dollars as such sum was conveyed and applied as aforesaid on account of the payments made by the United States as herein stated for services rendered in the year 1891?

And to that end this court hereby certifies such questions to the Supreme Court.

Dated February 4th, 1897.

E. HENRY LACOMBE,
N. SHIPMAN,
Judges of the United States Circuit Court of Appeals for the Second Circuit.

9 UNITED STATES OF AMERICA, *Second Circuit, ss:*

I, James C. Reed, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing certificate in the case entitled "The United States of America, plaintiff in error, against Jesse Johnson, defendant in error," was duly filed and entered of record in my office, by order of said court, on the 4th day of February, 1897; and, as directed by said court, the said certificate is by me forwarded to the Supreme Court of the United States for its action thereon.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said United States circuit court of appeals for the second circuit, at the city of New York, in the southern district of the State of New York, this 4th day of February, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twenty-first.

[SEAL.] JAMES C. REED,
Clerk United States Circuit Court of Appeals for the Second Circuit.

(Indorsed on cover:) Case No. 16492. Term No. 306. The United States, plaintiff in error, vs. Jesse Johnson. U. S. C. C. of appeals, 2nd circuit. (Certificate.) Filed February 12th, 1897.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
JESSE JOHNSON. } No. 59.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

In passing upon the several questions certified by the circuit court of appeals, I submit, for the consideration of the court here, the following argument, which I have taken from the brief prepared and used by the attorney for the United States in the court below, and which, I think, presents the case fully in behalf of the United States:

STATEMENT.

While the plaintiff was the incumbent of the office of United States district attorney, and in the month of July, 1891, he received letters from the officers of the Government directing him to examine the title to certain land

on Staten Island which was desired by the Government for the purpose of harbor defense. The title to said property was examined, said examination being a necessary prerequisite for a suit for condemnation which was afterwards instituted and carried through by the plaintiff, and for the services in both proceedings this action was brought. The Government admitted the rendition of the services and the value thereof, the same having been passed upon by the Attorney-General, but defends the action upon two grounds, first, that Mr. Johnson had received for services in the prior year a sum which exceeded the sum of $6,000 by an amount greater than that claimed in this action, and the Government set up as a counterclaim such payments alleged to have been erroneously made. It also interposed the further defense that the services rendered were such as were included within and paid by the salary of $200 a year.

Alleged evidence was given in the action to the effect that it had been a universal custom of the Department to pay for such services in addition to the usual salary of $200 per year. Upon these issues the case came on for trial before Justice Benedict, without a jury.

POINT I.

The services rendered were those imposed by law upon district attorneys, and, therefore, were included within his compensation of $200 per year.

We shall assume, for the present, that the services in question were such services as were imposed by law. The scheme under which the compensation for United States attorneys is provided may be conveniently divided

into three classes: First, such services as are included in the annual salary of the district attorney; second, such as are included in the fee bill; and third, cases otherwise expressly provided by law. The plaintiff rejects the fee bill (sec. 824). Hence, it must either come within such services as are paid by his annual salary or under the cases expressly provided by law. The sections bearing upon these various provisions are as follows:

> SEC. 770. The district attorney for the southern district of New York is entitled to receive quarterly for all his services a salary at the rate of $6,000 a year. For extra services the district attorney for the district of California is entitled to receive a salary at the rate of $500 a year, and the district attorneys for all other districts at the rate of $200 a year.
>
> SEC. 823. The following and no other compensation shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to district attorneys, clerks of the circuit and district courts, marshals, commissioners, witnesses, jurors, and printers in the several States and Territories, except in cases otherwise expressly provided by law.

Then follows section 824, which provides the fee bill under which the greater part of the services in civil cases performed by district attorneys are paid. No compensation could be awarded to plaintiff under this section because there is no docket fee, the case never having been upon the calendar.

Congress has not left us in doubt as to the construction to be placed upon these various sections. Section 1764 provides as follows:

> No allowance or compensation shall be made to any officer or clerk by reason of the discharge of

duties which belong to any other officer or clerk in the same or any other department, and no allowance or compensation shall be made for any extra services whatever, which any officer or clerk may be required to perform, unless expressly authorized by law.

SEC. 1765. No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation.

It will thus be seen that the one thing which the National Legislature has intended to provide so plainly that it could not be doubted is that no district attorney should receive compensation for any of the services imposed by law, except the special provisions contained in sections 770, 823, and 824. In other words, that they shall receive for the various services classified under section 824 the fees therein mentioned, and that for all other services, except those expressly provided by law, the salary of $200 has been deemed sufficient.

Similar claims have from time to time been presented to the Government and the claimants have rested their respective cases upon a line of decisions of the Attorneys-General. An examination of them, however, discloses the fact that all have followed the authority of Attorney-General Cushing, decided January 25, 1855 (7 Op., 46). In none of these opinions does any Attorney-General

seem to have given the subject careful consideration, but they have each been content to rely largely upon the authority of their predecessor, so that each one of these opinions depends for its authority solely upon the case decided by Attorney-General Cushing above mentioned. This opinion seems to have been so important a factor in the settlement of this question, so far as it could be settled in the office of the Attorney-General, that a liberal quotation of it is here deemed useful:

> I have had some hesitation on this subject in view of the provisions of the act of Congress of February 26, 1853, defining the fees of district attorneys, marshals, and clerks of circuit and district courts. *The act provides no fee for this duty*, although it is required of district attorneys to make such examination of titles and abstracts thereof for the information of the Attorney-General, to enable him to pass on titles according to the provisions of the joint resolution of September 11, 1841. The duty is a delicate and important one, requiring legal science and much care and personal attention. On the whole it seems reasonable to consider the act of 1853 as providing the fees only of the duties enumerated; and that for duties not enumerated he is to have a fee either in analogy of those fixed by the act or at the discretion of the head of the department ordering the service.

It is thus seen that the decision of Attorney-General Cushing was, in fact, a determination that a district attorney might receive fees not included in the fee bill (section 824), nor under any express provision of law; but he based his decision entirely upon the equitable view, outside of any special provision of the statute.

No Attorney-General in any of the line of opinions thus given has contended that there was any special provision of law applicable to such service. It must, however, be admitted that the opinions of the Attorneys-General thus given, covering as they do such a long period of time and holding the same proposition without exception, would be of very high and perhaps controlling authority, were it not for the fact that the Supreme Court of the United States has passed upon the question, holding directly to the contrary. The decision was rendered in the case of *Gibson* v. *Peters* (150 U. S., 342). That was an action brought by United States Attorney Peters against a receiver appointed under the national banking act for services rendered to him as such receiver. Justice Harlan delivered the opinion of the court, and disposed of the proposition in the following language:

> A distinct provision is made for the salary of a district attorney, and he can not receive on that account any more than the statute prescribes. But the statute is equally explicit in declaring in respect to compensation that may be taxed and allowed that he shall receive no other than that specified in sections 823 to 827, inclusive, except in cases otherwise expressly provided by law.

Justice Harlan has thus announced the very converse of the proposition which was made the basis of the opinion of Attorney-General Cushing and all of his successors. The proposition is further emphasized by the following language:

> Congress evidently intended to require the performance by a district attorney of all the duties imposed upon him by law without any other remuner-

ation than that coming from his salary, from the compensation or fees authorized to be taxed and allowed, and from such other compensation as is expressly allowed by law specifically on account of services named.

See also *Cole* v. *United States*, 28 C. Cls., 501.

In this connection reference should be made to section 3, chapter 328, of the Laws of 1874, which reads as follows (18 Stat., 109):

> No civil officer of the Government shall hereafter receive any compensation or perquisites, directly or indirectly, from the Treasury or property of the United States beyond his salary or compensation allowed by law: *Provided*, That this shall not be construed to prevent the employment and payment by the Department of Justice of district attorneys as now allowed by law for the performance of services not covered by their salaries or fees.

This clause was interpreted by Comptroller Lawrence, in the case of *Bliss* v. *United States* (5 Lawrence, 38), as an authority to pay compensation to district attorneys for services similar to those performed in this case; but he was overruled in that respect in the case of *Collins* v. *United States* (15 C. Cls., 15). The court there held that the proviso of that section was not an enabling act, but was simply a modification of the previous clause of the section. It is purely negative in its character and accords no affirmative relief. Its language is that nothing shall prevent the employment of district attorneys, etc., as now allowed by law; but this section was passed and this language was used and adopted by Congress at a time when all of the provisions previously quoted in this brief were in force. The only provisions

especially allowed by law for payments to district attorneys were then as now under section 825, which provides for a payment to him of 2 per cent upon all moneys collected or realized in any suit or proceeding arising under the revenue laws; section 827, which provides that "when a district attorney appears by direction of the Secretary or Solicitor of the Treasury on behalf of any officer of the revenue in any suit against such officer * * * that he shall receive such compensation as may be certified to be proper by the court in which the suit is brought and approved by the Secretary of the Treasury;" and section 4646, which provides for extra compensation in prize cases.

The services described in the complaint were included in services imposed by law upon district attorneys.

We have thus far considered the question upon the assumption that the services rendered by the plaintiff were such services as were imposed upon him by law. This assumption can be easily sustained; and first, with reference to his services in examining the title. Section 355 provides as follows:

> SEC. 355. No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any armory, arsenal, fort, fortification, navy-yard, custom-house, light-house, or other public building of any kind whatever until the written opinion of the Attorney-General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land or site may be, to such purchase, has been given. *The district attorneys of the United States, upon the application of the Attorney-General, shall furnish any assistance or information*

> *in their power in relation to the titles of the public property lying within their respective districts.* And the Secretaries of the Departments, upon the application of the Attorney-General, shall procure any additional evidence of title which he may deem necessary, and which may not be in the possession of the officers of the Government, and the expense of procuring it shall be paid out of the appropriations made for the contingencies of the Departments, respectively.

In view of this section, it can not be seriously contended that the duty of examining a title did not come under those duties which are imposed by law upon United States district attorneys. This question was also determined in the case of *Collins* v. *United States*, above quoted.

It is equally clear that the services rendered in the condemnation proceedings were also imposed by law. Section 771 provides as follows:

> It shall be the duty of every district attorney to prosecute in his district all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States are concerned, and, unless otherwise instructed by the Secretary of the Treasury, to appear in behalf of the defendants in all suits or proceedings pending in his district against collectors, or other officers of the revenue, for any act done by them or for the recovery of any money exacted by or paid to such officers, and by them paid into the Treasury.

Here was a proceeding instituted in behalf of the United States, involving a direct issue with the owners of the land in question; and it is not believed that any

further argument is required to substantiate the position that the conduct of such proceedings was a duty imposed by law upon the plaintiff at the time they were being conducted.

POINT II.

The defendant in error had already been paid by the receipt of moneys during the previous year which were in excess of $6,000 by an amount exceeding the claim presented in this action.

The Government further defends the claim presented here upon the ground that plaintiff has already been paid.

The accounts between Mr. Johnson and the Government for the preceding year have been put in evidence (see fol. 247), and they show that he received in excess of his limit of $6,000 an amount equal to the sum claimed in this action; and the Government asks that that amount should be applied in liquidation of the claim presented here as payment. The stipulation between the parties (fol. 104) simplifies this proposition, so that the court is only called upon to consider the proposition of law, as to whether the services in question are such as come within the limit of $6,000 provided by statute as the amount beyond which a district attorney can not receive for his compensation and emoluments; second, whether or not, if it comes within such provision, the excess paid to Mr. Johnson the previous year can be applied now in liquidation of this claim.

Section 835 provides:

> No district attorney shall be allowed by the Attorney-General to retain of the fees and emoluments

of his office which he is required to include in his semiannual return, for his personal compensation, over and above the necessary expenses of his office, including necessary clerk hire, to be audited and allowed by the proper accounting officers of the Treasury Department, a sum exceeding six thousand dollars a year, or exceeding that rate for any time less than a year.

Section 833 provides:

> Every district attorney, clerk of a district court, clerk of a circuit court, and marshal, shall, on the first days of January and July in each year, or within thirty days thereafter, make to the Attorney-General, in such form as he may prescribe, a written return for the half year ending on said days, respectively, *of all the fees and emoluments of his office, of every name and character*, and of all the necessary expenses of his office, including necessary clerk hire, together with the vouchers for the payment of the same for such last half year. He shall state separately in such returns the fees and emoluments received or payable under the bankrupt act. * * * Said returns shall be verified by the oath of the officer making them.

The substance of the two sections above quoted is that fees and emoluments "of every name and character" are included within the prohibition of this section. Mr. Johnson received in the previous year a sum more than he was entitled to, and which excess was equal to the amount claimed in this action. The Government, therefore, has paid him in advance for all of the services set up in the petition.

Objection is made that, conceding the contention of the Government that money by way of emoluments and

compensation was paid to him by mistake the prior year in excess of his $6,000 to which he was limited, yet it can not be recovered back. Such probably is the law as to individuals, but not as to the State and Government. It would certainly be most dangerous to hold that the act of an officer of the Government, in paying out money of the Government upon erroneous understandings of the law, should bind the Government so that it could not be recovered back. For the same reason that the statute of limitations in many instances does not run against the Government, and that interest can not be recovered against it, nor costs, it ought to be exempted from this rule of law. It is powerless to guard against mistakes of its officers, and it is believed is not exposed to the strict application of the rule contended for.

POINT III.

The Government is not bound by the former rulings of the Department of Justice.

The Government is confronted with a proposition that a long-continued practice of its accounting officers, sanctioned and confirmed by the opinions of the Attorneys-General, has permitted the construction contended for by the plaintiff, and by that construction the Government is now bound, irrespective of whatever might otherwise be decided as the legal interpretation of the statutes affecting the issues in this case.

(*a*) No legal evidence of any such custom was given.

This proposition depends upon evidence which may be found at folio 109 *et seq.* of the case. The plaintiff offered in evidence a pamphlet issued by the treasurer of

the department purporting to contain opinions of the Comptroller in which he cited opinions of Attorneys-General, and it is alleged by the plaintiff that those opinions of the Attorneys-General establish such a custom. No other evidence was offered upon this subject, as appears by the plaintiff's statement in the eleventh folio, as follows:

> Mr. JOHNSON. I think I am willing to rest upon the opinions of the Attorneys-General.

No argument will be indulged in upon this proposition, as it is elementary. It is well known to the court that opinions of the Attorneys-General are published in book form, and if the opinion of the head of the Department were evidence of the conduct of that Department, certainly the opinions themselves might have been produced. The plaintiff, however, has chosen to rely upon an opinion written by the Comptroller, in which he quotes from said opinions without even purporting to give them in full.

It is respectfully insisted that this is no evidence of what the actual custom and conduct of the Department was during this period.

(*b*) Assuming that the opinion of Comptroller Bowler, found upon pages 54–82 of the record, is evidence of the Department, it fails to afford any ground of liability by the Government under the circumstances of this case.

The abstract proposition is stated in the case of *United States* v. *Moore*, by Justice Swayne in 95 U. S., 760, 763:

> The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and ought

not to be overruled without cogent reasons. *Edwards* v. *Darby*, 12 Wheat., 210; *United States* v. *State Bank of North America*, 6 Peters, 29; *United States* v. *McDaniel*, 7 Peters.

It has been held in other cases that—

> In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who are called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.

The proposition was more elaborately stated in *United States* v. *Hill* (120 U. S., 169), where the issue involved the allowance of certain fees to a clerk. It was the custom in the United States courts in Massachusetts, from 1839 to December, 1884, known and approved by the judges, for the clerk to charge $3 as fees in naturalization proceedings. The clerk of the district court never included those fees in his return. That fact was known to the judges to whom his accounts were semiannually exhibited, and by whom they were passed without objection in this particular. Relying on that custom, and believing that those fees formed no part of the emoluments to be returned, the clerk of the district court appointed in 1879 did not include those fees in his accounts. This was known to the district judge when he examined and certified the accounts, and his accounts, so made out, to July, 1884, were examined and adjusted by the accounting officers of the Treasury. This was an action brought on the official bond of the clerk against him and his surety to recover the amount of naturalization fees which it was claimed by the Government the

clerk should have accounted for to the Government. On page 182 the court say:

> The agreed statement of facts shows * * * that the district judge has examined and certified the accounts, knowing that they did not include naturalization fees; and that these accounts have been revised on their merits by these accounting officers, for this long series of years, and been examined and adjusted by them with the naturalization fees not included.
>
> With this long practice, amounting to a contemporaneous and continuous construction of the statute, in a case where it is doubtful whether the statute requires a return of the disputed fees, judges of eminence, heads of departments, and accounting officers of the Treasury having concurred in an interpretation in which those concerned have confided, the surety in the present bond, as well as his principal, had a right to rely on that interpretation in giving the bond; and the semiannual accounts of the principal having been actually examined and adjusted at the Treasury, with the naturalization fees excluded, down to and including the one last rendered, five months before this suit was brought, a court seeking to administer justice would long hesitate before permitting the United States to go back, and not only as against the clerk, but as against the surety on his bond, reopen what had been settled with such abundant and formal sanction. This principle has been applied as a wholesome one for the establishment and enforcement of justice in many cases in this court, not only between man and man but between the Government and those who deal with it and put faith in the action of its constituted authorities, judicial, executive, and administrative.

The case of *United States* v. *Hill* presents the question in the nature of an estoppel; but the facts in this case

fall far short of the conditions upon which the court was called upon to speak in that case. The only evidence presented is that of a series of opinions by Attorneys-General. The court is not informed what action the officers of the Government have taken, but the plaintiff has been content to rest solely upon the opinions of the Attorneys-General, and these opinions are not shown to be uniform except upon the question contained in the first cause of action mentioned in his complaint, to wit, services in examining the title to the lands which were made the subject of the condemnation proceedings. The evidence in this case is to the effect that such examination was not an independent retainer but was necessary to the suits for condemnation proceedings, and a part of the services rendered in said action (fol. 101); in fact, no special retainer is shown in the papers, nor any request for such proceedings to be taken other than the general authority to condemn the property on behalf of the United States.

We are, therefore, led to consider the question simply as to whether the services of Mr. Johnson in prosecuting the actions to condemn the property in question entitled him to other than the compensation mentioned in section 824. It is denied that there is any such line of decisions, or any such course of conduct on the part of the Government as to create an estoppel under the authority of *United States* v. *Hill*, above quoted. There are many cases in which attorneys have been paid for services in prosecuting actions by the United States at the request of heads of Departments and otherwise, and many cases where compensation for such service has been denied; but not one

in which the services in an action brought to condemn property in behalf of the United States has been passed upon by the Attorneys-General or high Government authority, except the single instance in which the plaintiff herein was paid for similar services the year prior to that in which the services in question were rendered. As far back as 1855 we find the opinion of Attorney-General Cushing, in the seventh volume of Opinions of Attorneys-General, page 84, in which he held that for the duty of preparing titles for the examination of the Attorney-General under joint resolution of September 11, 1841, equitable compensation might be made to a district attorney out of the appropriation for public work, the site of which was in question, yet he held that for a general action, in which the United States was a party, a district attorney could not recover for services. His language was as follows:

> But in a matter like that now before me, which is of the direct official business of a district attorney in the court of the United States for his district, which is of the very class of business for which the act of 1853 expressly and in plain terms provides, and as to which any other compensation is emphatically excluded by the strong terms of that act, it does not appear to me that any extra or special compensation can be lawfully paid to the district attorney.
>
> Nor, in my judgment, is the case taken out of the general rule by the fact that the suit concerns immediately the business of the Navy Department, and has been the subject of instructions from the Secretary of the Navy. All the civil business of

> the Government concerns some one of its Departments, and may require the attention of its head. It can not be that a suit in the name of the United States, pending in the district or circuit court, is out of the scope of the regular duty of a district attorney because of its arising in the business of the Navy Department rather than the Treasury or any other Department; nor that in such a case the service of the district attorney becomes that of counsel specially retained by the Department.
>
> This latter enactment must have been designed, it seems to me, for contingencies, where a head of Department needs professional services in a case not provided for by the particular terms of the law, and the special compensation to a district attorney for the performance of such service must depend on that fact, not on the fact that he has been instructed by the head of Department. A contrary construction would lay the foundation for extra compensation to district attorneys in almost every case in which they appear in civil actions in which the United States are concerned.

Thus the plaintiff had before him the opinion of Attorney-General Cushing to the effect that no services by a district attorney when performed in any action where the Government in any of the United States courts was a party should be paid for other than that provided in section 824, unless some special provision of law could be invoked in its support.

Attorney-General Black was equally plain and specific in his opinion, contained in the ninth volume, Opinions of Attorneys-General, page 146. He says:

> When a duty is enjoined upon him by the law of his office and not merely by the request of a

> Department, he is bound to perform it and take as compensation what the law gives him. That is his contract, and if it be a bad one for him he has no remedy but resignation. The subject is not open to a new bargain between him and any other officer of the Government. All criminal prosecutions and all civil suits in which the United States are a party of record fall within this principle. In them no charge for extra services can be legally allowed, though it be true that some of them require an amount of labor and skill for which the compensation allowed by the fee bill is altogether inadequate. I can not make out in any way satisfactory to my own mind the ingenious distinction which would pay the officer as attorney what the fee bill gives and then pay him besides a *quantum meruit* for managing the same case as counsel.

There is, therefore, no element of estoppel. He had no specific precedents such as described in the case of *United States* v. *Hill*.

If now he relies upon the abstract proposition stated in the case of *United States* v. *Moore*, above cited, his contention certainly can not be sustained.

We are enjoined by that rule to give most respectful consideration to the construction given to a statute by those charged with the duty of executing it.

The Supreme Court, in *Swift* v. *United States* (105 U. S., 691, 695), also held:

> The rule which gives determining weight to contemporaneous construction put upon a statute by those charged with its execution, applies only in cases of ambiguity and doubt.

In *United States* v. *Graham* (110 U. S., 219, 221), Chief Justice Waite said:

> It matters not what the practice of the Departments may have been or how long continued, for it can only be resorted to *in aid of interpretation, and it is not allowable to interpret what has no need of interpretation.*

The principle, then, is that while respectful consideration must be given to the contemporaneous heads of Departments in determining the effect of a statute, nevertheless their conduct and decisions can not be controlling nor considered in a doubtful case.

The Supreme Court, in the case of *Gibson* v. *Peters* (150 U. S., 342, 347), above quoted, decided that actions similar to this are not a subject of doubt. After referring to the sections providing for the fees of district attorneys, Justice Harlan says:

> It also declares that he shall receive no other compensation than that specified in sections 823 and 827, inclusive, except in cases otherwise expressly provided by law. It also declares that no officer in any branch of the public service shall receive any additional pay, extra allowance, or compensation in any form whatever for any service or duty, unless the same is expressly authorized by law or unless the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation. No room is left here for construction. It is not expressly provided by law that a district attorney shall receive compensation for services performed by him in conducting suits arising out of the provisions of the national banking law in which the United States or any of its officers or agents are parties.

> Without such express provision, compensation for services of that character can not be taxed, allowed, or paid. Nor can the expenses of the receivership be held to include compensation to the district attorney for conducting a suit in which the receiver is a party, for the obvious reason that the statute does not expressly provide compensation for such services. Congress evidently intended to require the performance by the district attorney of all the duties imposed upon him by law without any other remuneration than that coming from his salary, from the compensation of fees authorized to be taxed and allowed, and from such other compensation as is expressly allowed by law specifically on account of services named.

The court was then speaking of services rendered under section 380, which required an official duty of the district attorney in national-bank cases. The language is almost precisely the same as that contained in section 771, requiring attorneys to prosecute all civil actions in which the United States are concerned. Both sections impose the duty upon the district attorney. The effect, therefore, of the decision in *Gibson* v. *Peters* is precisely the same as though the court were deciding a case with reference to the compensation for conducting condemnation proceedings.

We thus are able to invoke the highest authority, to wit, the judgment of the Supreme Court, in support of the position of the Government upon this proposition, as well as those considered in the earlier part of this brief. No argument has been urged in this action that could not with equal propriety and force have been urged in the case of *Gibson* v. *Peters*. And thus the Supreme

Court, with the opinions of the Attorneys-General before it, with the same evidence of the alleged uniform ruling of the department that has been given in this case under its consideration, has determined the proposition that a district attorney can not recover for any services which are imposed by law upon him anything in the nature of extra compensation. It not only decided this, but it also made its decision in the face of the fact that the ruling of the department with reference to services rendered to a receiver under the national banking act entitled the district attorney to extra compensation (19 Op., 152).

Nothing need be added here on the subject of the merits of this case. No time need be spent in the endeavor to sustain the proposition that Mr. Johnson should receive for the services proven more than can be paid to him under sections 823 to 827 above quoted. It may be conceded that under those sections he would not be sufficiently paid. It may be conceded that as an original proposition his services may have been worth all that is contended for, and yet the force of the legal proposition remains. There is absolutely no law under which a recovery can be had by the plaintiff. He had before him the statutes. They contained a plain and unqualified prohibition against his receiving pay for the services for which this action is brought. Courts, therefore, are not called upon, nor have they a right, to create any new laws for the purpose of affording compensation which it might be disposed otherwise to give to the plaintiff. Its duty is to enforce the law which it finds upon the statute book; and it is respectfully submitted that since that law

has recently been pronounced by the highest court of the United States clearly and unqualifiedly adverse to the claim of the plaintiff, no course is left but to obey that decision and determine this matter in favor of the Government. Such considerations require a reversal of the judgment.

JAS. E. BOYD,
Assistant Attorney-General.

No. 59.

Brief of Johnson Pro Se.

Filed Jan. 9, 1899.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
JESSE JOHNSON.
} No. 59.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR JOHNSON.

JESSE JOHNSON,
Appearing in Person.

Eagle Print, Brooklyn-New York

Supreme Court

OF THE UNITED STATES.

The United States,
Plaintiff in error,

against

Jesse Johnson,
Defendant in error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This cause comes before this Court on a certificate from the Circuit Court of Appeals for the Second Circuit, asking instruction of this Court upon three questions of law, arising on the facts stated in the certificate.

The three questions of law are as follows:

1. Is said Johnson entitled to be paid by the Government of the United States the said sum of six thousand five hundred dollars for the services rendered as aforesaid in the year 1892?

The foregoing question is submitted without reference to the provisions of Section 835 of the Revised Statutes, which are referred to in the questions following.

If the foregoing question is answered in the affirmative, then there is presented the further question—

2. Is such compensation to be included in the fees and emoluments of claimant's office within the provisions of Sections 834, 835, and 844 of the Revised Statutes?

If both of the above questions are answered in the affimative, then there is presented the further question—

3. Can the Government of the United States, under the circumstances here stated, convey and apply the said sixty-five hundred dollars as such sum was conveyed and applied as aforesaid on account of the payments made by the United States as herein stated for services rendered in the year 1891?

Generally stated the facts are as follows:

Johnson, the defendant in error, was District Attorney of the United States for the Eastern District of New York. While holding that position he was employed and directed by the United States to acquire by condemnation, for fortification purposes (for

a mortar battery), certain lands situated in that district (folio 2).

The certificate states:

> "Such employment was made as follows: At the special written request of the Secretary of War, the Attorney General instructed said Johnson, in writing, to institute such proceedings on behalf of the United States for the condemnation of such lands; with such written instruction he enclosed a copy of such request from the Secretary of War, and stated that he acted agreeably thereto."

In order to condemn it was necessary to ascertain the title to such lands (fol. 4).

In the year 1892, Johnson properly ascertained the title to all such lands, and instituted and carried through the condemnation proceedings; the services so rendered by him were worth six thousand five hundred dollars, and a bill for that amount was duly approved and allowed by the Attorney General (fol. 4). Thereupon the financial and accounting officers of the Government so proceeded that a warrant for that amount was drawn on funds appropriated for the War Department, and conveyed into the treasury of the United States in repayment of an alleged over-payment to Johnson (fol. 6).

The right to so convey and apply such sum $6,500 was claimed by the Government, because for similar services rendered in the previous year (1891) it had paid him more than the maximum of $6,000 fixed by section 835 of the Revised Statutes (fol. 6). No claim

is made that he had been paid for such previous services any sum in excess of their fair value or beyond what the proper officers of the Government had duly audited and allowed therefor.

The amount which had been paid him for services rendered in the year 1891 does not appear; but the record contains a stipulation to the effect that *if* his (Johnson's) compensation for such services rendered in the year 1891 was limited to the maximum provided by Section 835, then the over-payment to him for the year 1891 was equal to the amount so charged against him and here in suit, that is, was equal to $6,500 (fol. 7).

As the defendant in error understands, the Government defends on these two propositions:

First—That the services so rendered by Johnson were a part of his official duties as District Attorney, and that for that reason he can have no compensation therefor except his salary ($200 per annum, § 770 Revised Statutes), or such sums [trifling in amount] as are taxable under the fee bill; that, at any rate, he cannot recover on the basis of value, and a recognition and allowance by the Attorney General.

Second—That if he could otherwise recover on the basis of value, the compensation for these services, as well as for similar services in the previous year, are a part of "the fees and emoluments of his office," limited to $6,000, by Section 835; and that the over-

payment appearing on that basis for 1891 was properly liquidated by the appropriation of his earnings for the year 1892.

The consideration of the first defense involves an answer to the first question certified to this Court.

The consideration of the second defense involves a consideration of the second and third questions so certified.

POINTS.

FIRST PART.

Apart from the provisions of Section 835 of the Revised Statutes—the section fixing the maximum of $6,000—the defendant in error was entitled to recover.

In other words, the first question should be answered in the affirmative.

I.

The previous proceedings in this case indicate that counsel for both parties are practically agreed that the vital question is:—Are there, or are there not, provisions of statute law which imposed on Johnson as an official the duty or obligation to render these services,—to do so for his salary, or such compensation as might be taxed under the fee bill

The fair discussion of this question seems to impose on counsel for the Government the burden of pointing out the statutes which they claim have that effect. Accepting that burden, they have presented to the Court Sections 355, 770, 771, 823, 1764, 1765, of the Revised Statutes, and Section 3, Chapter 158 of the Laws of 1874,—all of which are printed as an addender to this brief.

A provision contained in the Sundry Civil Appropriation Act for 1889 (25 Stat. 941) was at one time cited on the same point, but now seems to be abandoned. Its provisions were all dependent upon the "*grantor*" providing and furnishing full abstracts and searches, and hence could have no relation to a proceding to condemn, a proceeding against an unwilling and resisting owner.

Besides it was limited to sites for *public buildings*, which are quite different from the two or three hundred acres required for the "mortar batteries" necessary to defend New York City.

Probably, from that statute, under the rule *expressio unius exclusio alterius*, a fair argument could be drawn in favor of this defendant. He, however, hopes to convince the Court that his claim is dependent on inferences and conclusions much more apparent and certain.

II.

The services here in question were rendered under the authority of special provisions of statute law, the more essential

portions of which are quoted in the certificate (folios 2 and 3)

The provision there quoted—*much later in date than any of the statutes cited for the Government*—are complete in themselves, and would have been effective if every law passed by Congress—except the laws constituting the office of Secretary of War, and for revenue and disbursement—had been repealed.

NOT ONLY DO THEY FAIL TO IMPOSE ON THE DISTRICT ATTORNEY THE OBLIGATION HERE IN QUESTION, BUT BY SCOPE AND OBVIOUS INTENDMENT, AND ALMOST BY LETTER, THEY REPEL SUCH A PRESUMPTION, CLEARLY INDICATING THAT THE SERVICES WERE RENDERED UNDER AN EMPLOYMENT OF THE INDIVIDUAL, AND NOT UNDER AN EXACTION OF SUCH EXTRAORDINARY AND LONG CONTINUED LABOR FROM THE OFFICIAL.

The provision quoted in the certificate is contained in an act entitled: "An Act making appropriations for *fortifications* and other works of *defense*, for the *armament* thereof, for the procurement of heavy *ordnance* for trial and service and for other purposes" (26 Statutes at large, 315). It was a nation's provision for heavy armanent; an exercise of the war power by and through the War Department; and the section contained in the certificate is but a minor and incidental part of its large and extraordinary provisions.

The portions of this Act quoted in the certificate are as follows:

"GUN AND MORTAR BATTERIES.—For construction of gun and mortar batteries for defence of Boston Harbor, two hundred and thirty-five thousand dollars; New York, seven hundred and twenty-six thousand dollars; San Francisco, two hundred and sixty thousand dollars.

"For the *procurement* of land or right pertaining thereto needed for the site, location, construction or prosecution of works for fortifications and coast defenses, five hundred thousand dollars or so much thereof as may be necessary, and hereafter the SECRETARY OF WAR *may cause proceedings to be instituted* in the name of the United States, in *any* court having jurisdiction of such proceedings, for the *acquirement by condemnation* of any land or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications and coast defenses, such proceedings to be prosecuted *in accordance with the laws relating to suits for the condemnation of property* OF *the states wherein the proceedings may be instituted;* Provided, that when the owner of such land or rights pertaining thereto shall fix a price for the same, which in the opinion of the Secretary of War shall be reasonable, he may purchase the same at such price without further delay; Provided further, that the Secretary of War is hereby authorized to accept on behalf of the United States donations of land or rights pertaining thereto, required for the above mentioned purposes.

"And provided further, that nothing herein

contained shall be construed to authorize an expenditure, or to involve the Government in any contract or contracts for the future payment of money in excess of the sums appropriated therefor."

This provision was supplement by an additional appropriation of $500,000 made by the next Congress (27 Statutes at Large, 258).

In relation to this provision I present the following considerations:

1.

As it allowed the proceeding to be instituted "in *any* Court having jurisdiction of such proceedings" and made applicable the laws of the state where the land was situated, it is obvious that the lawmaking power contemplated that the proceeding might perhaps, probably would be, taken in the *State* Courts.

In the addenda to this brief are printed two *general* and *continuing* acts relating to the condemnation of land—both passed in the same year, 1888. They were (so far as my research can ascertain) the first acts ever passed by Congress giving any authority to condemn except in special cases. One of those acts practically provided that the proceeding should be in the United States Court. The other act, *mutatis mutandis*, is the same as the provision quoted above, *which was obviously copied from it.* The fact that Congress chose this form, and rejected the one which contained the provision as to the United States Courts, would render certain the construction here claimed, if it were otherwise doubtful.

2.

It is *not* a part of the official duty of United States District Attorneys to appear or act in suits in *State* Courts in which the United States is a party or is interested.

Opinions of Attorneys General as follows:

Vol. I, p. 385, Attorney General Wirt.

Vol. II., p. 318, Attorney General Berrian.

Vol. III., pp. 45, 252, 599, Attorneys General Butler and Gilpin.

Vol. IV., pp. 294, 514, Attorneys General Nelson and Mason.

Vol. VI., p. 299, Attorney General Cushing.

Vol. X., p. 146, Attorney General Bates.

Apart from the high standing of the lawyers who gave those opinions, they have authority as the rule of action prescribed by high and competent authority.

Brown vs. U. S., 113 U. S., 565.

United States vs. Moore, 95 U. S, 760.

United States vs. Hill, 120 U. S., 169.

People vs. Adelphi Club, 149 N. Y., 14.

Especially should such an opinion have weight where it was given to state the duties of public officers *inter sese*, and apparently has been accepted and had controlling effect for a century.

At least we may say that if Congress intended that this great exercise of the war power should, in one of its initial and very important steps, impose a great and

additional labor on a very humble officer of the Department of Justice, paid by a salary and fees fixed in the last century—if Congress so intended, hardly would it have expressed that intent in language which had uniformly been given a different interpretation.

3.

The construction claimed by the Government is clearly repugnant to the earlier act of 1888; considerations which affect the construction of that act equally affect this provision.

In the case of Kohl vs. United States (91 U. S., 367), it is stated, both in the opinion of the learned Court and in the brief of counsel (pp. 369, 373), that down to the passage of the act there discussed (1872) Congress had failed to exercise the power of condemnation; and that when the exercise of that power had been necessary, it had been exercised by the States and in the State Courts.

In 96 N. Y. Reports, 227 (Matter of Petition of United States), is reported a case where condemnation was had by the United States, under the authority of *State* laws applicable to the *specific* localities and purposes stated in such laws.

It seems clear that down to 1888 the power of condemnation was exercised, in part at least, under the authority of State laws; and I believe it is certain

that Congress never passed an act which gave any power of condemnation, either *general* or *continuing*, until that year.

Hence this earlier Act of 1888 *is to be construed in view of the fact that prior to its passage,—except perhaps in some special cases not shown, all recent and all since* 1872—*no duty whatever had been imposed on District Attorneys as to condemnation.*

Practically I submit the Act of 1888 is to be construed as though this power of condemnation in the National Government had remained dormant or unused until that time, and the Act of 1888 was the first law by which it had been put in use.

The letter of the Act of 1888 harmonizes with the inferences which have been suggested from the examination of previous legislation. (See Addenda, page III.)

It is entitled as "An Act to facilitate works for the improvement of rivers and harbors." It may be invoked at places remote and various, wherever a river or a stream is to be straightened or widened, or a dumping ground obtained for river or harbor improvements.

Obviously it is an act passed to meet emergencies; it says the Secretary of War may purchase "*without delay*," or if condemnation proceedings are necessary, that he may go into *any* court. To hold that a Secretary of War could not institute those proceedings except through District Attorneys,—officers of another

department, and who might and very often would be very remote from the place where the land was situated,—would certainly cripple the power the act was intended to call into use.

4.

The other and more general act for condemning land, passed in the year 1888, expressly imposed the duties created by it on the Attorney General. (See Addenda, page IV.)

It is respectfully submitted that all this indicates that the settled and clear policy of the Government is opposed to the rule it here seeks to invoke.

5.

The Statute quoted in the certificate is complete in itself A special law complete in itself is not affected by prior general laws.

The converse—that a *special* law is not affected by a later *general* law—is too familiar to need citations of authority.

But much more should the *special* law stand distinct, when it is the later law (Matter of Murray Hill Park, 153 N. Y., 211; Matter of the City of Brooklyn, 148 N. Y., 108). The case last cited is singularly in point. There the Long Island Water Company's property had been condemned under a *special* law

The effort was to graft into that law provisions of the New York Code of Civil Procedure—a general law—which contained liberal provisions as to costs and counsel fees in condemnation cases. The Court rejected the claim because it found the *special* law was complete in itself.

> This case came before this honorable court, but upon points not related to this discussion. 166 U. S., 685.

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To bring this Statute under the yoke and harness of the Statutes cited on behalf of the Government would cripple the exercise of the power it confers.

It appropriates half a million of dollars not for land only but for its "procurement." *All* the power it confers is conferred on a single officer—on the Secretary of War.

If the position of the Government is right, the Secretary of War, whenever unable to purchase, could procure the land necessary to defend either of two great harbors in but one way, and by one man, and he in no way related to the Department of War, but a member of the Department of Justice.

> (For the provisions constituting and defining the great executive departments, see Revised Statutes 158).

Besides, he could not pay for the work, at least could not pay an amount based on the value of the service or above the allowances of the fee bill, and could not pay anything whatever if the District Attorney's official fees were already up to $6,000 a year for that year.

CLEARLY THE SECRETARY OF WAR HAD AUTHORITY TO EMPLOY ANY ONE, ANY LAWYER TO DO THAT WORK.

If that is so, though the Secretary did consult and advise with the Attorney General and select a lawyer accredited to that officer even by an official relation—the employment of Johnson was nevertheless the employment of the *individual and not the direction to the officer*.

III.

It may be, it is the fact that when these services were rendered there was no thought as to whether the service came to Johnson as an individual or as a public officer. The fact that he had been paid for a similar service the year before (top of page 3) and that it was and had been the custom and practice of the Government to pay District Attorneys for such services (folio 5) prevented any thought as to such a question, either on the part of the Secretary of War, the Attorney General, or the District Attorney. And that absence of consideration of the point now raised (apparent in the correspondence embodied in the

record below) is fairly indicated in the certificate of the Court, which uses both words "directed" and "employed" to state the transaction. Certainly under such circumstances Johnson may stand excused for not then raising a point, which would have been regarded as technical and unworthily suspicious.

But when the point is raised by the Government, adverse to what all parties then understood and considered, the defendant in error has the right to appeal to the law under which the work was done, and ask to stand or fall according to it—according to it as the Court may find it—affected or unaffected by the the various statutes cited on behalf of the Government.

SECOND PART.

In the preceding Part it has been urged that, under the provision of law quoted in the certificate, the business there contemplated of acquiring land by condemnation, being entrusted to the War Department, was altogether outside the statutes regulating the Department of Justice, and was entirely unaffected by any provisions of general law.

But if that contention fails and general laws do apply, then obviously:—

THE LAW WHICH APPLIES IS THE SECOND CONDEMNATION ACT OF 1888, AND THAT ACT IMPOSED ON THE ATTORNEY GENERAL THE DUTY OF CONDUCTING CONDEMNATION PROCEEDINGS. (Addenda p. IV.)

That is the only *general and continuing* act in relation to acquiring land by *condemnation*—except the earlier act of 1888, which applies only to River and Harbor Improvements.

If the proposition here stated is correct, this case is brought clearly within the rule stated in

United States vs. Winston, 170 U. S., 522.
United States vs. Garter, Ibid., 527.

Those cases establish that, where a duty devolved on the Attorney General is performed at his direction by a District Attorney, the service is authorized and is outside his official duty; and also that the payment therefor is not to be included or estimated in fixing his maximum.

No objection has been taken as to the form or manner of the Attorney General's certificate. In the absence of some objection or finding on that point a proper certificate will be presumed.

United States vs. Garter, *supra*.

Besides the statement in the record that the Attorney General directed the work and approved and allowed (folios 2, 4) the bill implies a proper certificate.

United States vs. Winston.
United States vs. Garter, *supra*.

2

The rule invoked affects the amount earned in *examining titles* equally with the amount earned in the direct proceedings to condemn

The examination of title was necessary to the condemnation proceedings (folio 4), and so was practically a part of it.

II.

This case is not effected by the decision in Gibson vs. Peters, 150 U. S., 342, or United States vs. Smith, 158 U. S., 346. The decision in both of those cases was put upon the ground that the services there in question *were a part of the official duties of the District Attorney*, those in the Gibson case being imposed by Section 380 of the Revised Statutes and those in the Smith case being within the provisions of Section 771 of the Revised Statutes.

Indeed, the statutes there discussed aid the claim here made. From them we see that Congress, from time to time, exercising new powers and making provision for new and additional services, has sometimes devolved the rendition of such services on District Attorneys and in other cases [as here] devolved them on the Attorney General.

THIRD PART.

Section 355 of the Revised Statutes, quoted in Addenda, page I, if it applies at all, is clearly repugnant to the claim now made by the Government.

Its first two lines indicate that it relates only to land *purchased* by the Government, and it was enacted when the power of condemnation was practically an unused power.

Its mandate to District Attorneys does not relate particularly to the acquiring of land, but generally requires him to be responsive, *so far as in his power*, in relation to the titles to all public property lying in his district.

But its last lines not only negative the claim here made by the Government, but, in the absence of other authority, would have allowed the Secretary of War to employ *any one* to make the search or ascertain the title to the property in question.

FOURTH PART.

The previous custom of the Government, and the previous dealing between the parties to this suit should determine this action in favor of Johnson.

United States vs. Hill, 120 U. S., 169.

The custom stated in the record was a custom which arose out of the acts of the officers of the Government—officers of the highest rank and dignity, and of the great Department of the Treasury, with all its complicated and numerous provisions for fair and faithful audit. (Sec. 191, R. S.).

The learned Attorney General criticises the *evidence* as to custom. But he obviously does so through

inadvertance and in following the brief of the District Attorney.

The Circuit Court of Appeals has not certified any evidence, but its inquiry is predicated upon the custom, presented as a recognized fact. And it is with that large fact that the argument must deal.

The certificate not only shows the custom, but that Johnson was paid for his services of the previous year under the rule implied by the custom. Had the Government then indicated its withdrawal from such a rule, the District Attorney at least had the option to resign.

And is it not self-evident that if the services in question were worth what the certificate says they were, if the rule here claimed had been announced or in any way understood, the services could not have been obtained of defendant in error or of any one who might have been appointed to his place?

FIFTH PART.

The second question certified to this Court should be answered in the negative. That question is as follows:

> Is such compensation to be included in the fees and emoluments of claimant's office within the provisions of Sections 834, 835 and 844 of the Revised Statutes?

1.

If the view presented in the First Part is correct, then obviously this compensation is not within the purview of those sections,—the employment or direction being to the *individual and not to the officer.*

2.

If the view presented in the Second Part is correct, then the case is precisely within the rule laid down in United States vs. Garter, and United States vs Watson, which fully sustain the position of the claimant as to the maximum, and it is respectfully submitted, in effect answer this question in the negative.

3.

In the light of the decisions cited above, any further discussion of this question seems almost like trespassing on the favor of the Court. But as this case will go before the Court on submission, where some new point might be raised, or by possibility the case determined on the point as to custom stated in Part Four, claimant feels at liberty to add these further suggestions.

Section 835 is a part of the same Title as Sections 767, 770, 771 and 823. Its provision is, that a District Attorney shall not have fees for *any part* of the year beyond the rate of $6,000 per annum:—that is to say, in no month can his fees exceed $500.

Under the rule of construing together cognate and related sections, it is very clear that the fees and

emoluments there spoken of are the fees and emoluments fixed by that Title. Such fees and emoluments are of such a character that they can be tabulated or computed for every day, week, or month in the year.

Compensation for service on a *quantum meruit*, especially where dependent on the certificate of the Attorney General, which can be given only after the service is completed, could not be computed or stated for the quarterly return required by Section 833, and clearly are not of the character contemplated by Section 835.

SIXTH PART.

The third question is as follows:

> Can the Government of the United States, under the circumstances here stated, convey and apply the said sixty-five hundred dollars as such sum was conveyed and applied as aforesaid on account of the payments made by the United States as herein stated for services rendered in the year 1891?

This question, however, is not presented, if the Court finds that the compensation here in question is *not* within the provision as to the maximum, or if its answer to the first question is in the negative (fol. 8).

This question practically is as follows:—If the Court should hold with the claimant, except as to the $6,000 maximum provision, and should hold that the maximum provision affected the compensation for

services of this character—in that case could the Government, having paid the claimant beyond the maximum for services in 1891, apply the compensation otherwise due for 1892 in liquidation of the over-payment for 1891? Deeming it settled that the maximum provision does not apply, claimant does not deem it necessary to trouble the Court with any extended argument on this point.

He, however, respectfully refers to the following cases:

McKee vs. United States, 12 Court of Claims Reports, 504.

Hillborn vs. United States, 27 Court of Claims Reports, 547.

Patterson vs. United States, 28 Court of Claims Reports, 321.

The first question should be answered in the affirmative, and the second question in the negative; and an answer to the third question is not necessary.

Respectfully submitted,

JESSE JOHNSON,
Defendant in Error,
Appearing in Person.

I.

ADDENDA.

The following six sections are from the Revised Statutes:

Section 355. No public money shall be expended upon any site or land purchased by the United States for the purposes of erecting thereon any armory, arsenal, fort, fortification, navy-yard, custom-house, light-house, or other public building of any kind whatever until the written opinion of the Attorney-General shall be had in favor of the validity of the title, nor until the consent of the Legislature of the State in which the land or site may be, to such purchase, has been given. *The District Attorneys of the United States, upon the application of the Attorney General, shall furnish any assistance or information in their power in relation to the titles of the public property lying within their respective districts. And the Secretaries of the Departments, upon the application of the Attorney General, shall procure any additional evidence of title which he may deem necessary, and which may not be in possession of the officers of the Government, and the expense of procuring it shall be paid out of the appropriations made for the contingencies of the Departments respectively.*

Section 770. The District Attorney for the Southern District of New York is entitled to receive

quarterly for all his services a salary at the rate of $6,000 a year. For extra services the District Attorney for the District of California is entitled to receive a salary at the rate of $500 a year, and the District Attorneys for all other districts at the rate of $200 a year.

Section 771. It shall be the duty of every District Attorney to prosecute *in his district* all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States are concerned, and, unless otherwise instructed by the Secretary of the Treasury, to appear in behalf of the defendants in all suits or proceedings pending *in his district* against collectors, or other officers of the revenue, for any act done by them or for the recovery of any money exacted by or paid to such officers and by them paid into the Treasury.

Section 823. The following and no other compensation shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to District Attorneys, clerks of the Circuit and District courts, marshals, commissioners, witnesses, jurors and printers in the several States and Territories, except in cases otherwise expressly provided by law.

Section 1764.—No allowance or compensation shall be made to any officer or clerk, by reason of the discharge of duties which belong to any other officer or clerk in the same or any other Department; and no

allowance or compensation shall be made for any extra services whatever, which any officer or clerk may be required to perform, unless expressly authorized by law.

Section 1765.—No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulation, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation.

No civil officer of the Government shall hereafter receive any compensation or perquisites, directly or indirectly, from the Treasury or property of the United States, beyond his salary or compensation allowed by law; provided that this shall not be construed to prevent the employment and payment by the Department of Justice of District Attorneys as now allowed by law for the performance of services not covered by their salary or fees. (Section 3 of the Act of June 20, 1874, 18 Statues, 131).

Chap. 194.—An Act to facilitate the prosecution of works projected for the improvement of rivers and harbors.

Be it enacted by the Senate and House of Repre-

sentatives of the United States of America in Congress assembled, That the SECRETARY OF WAR may *cause* proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, right of way, or material needed to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors for which provision has been made by law; such proceedings to be prosecuted *in accordance with the laws relating to suits for the condemnation of property in the States wherein the proceedings may be instituted;* Provided, however, that when the owner of such land, right of way or material, shall fix a price for the same, which in the opinion of the Secretary of War shall be reasonable, he may purchase the same at such price *without further delay;* And provided further, that the Secretary of War is hereby authorized to accept donations of lands or materials required for the maintenance or prosecution of such works.

Approved April 24, 1888. (25 Statutes at Large, 94).

Chap. 728.—An Act to authorize condemnation of land for sites of public buildings, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in every case in which the Secretary of the Treasury, *or any other officer* of the

V.

Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building *or for other public uses*, he shall be, and hereby is, authorized to acquire the same for the United States by condemnation under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the United States Circuit or District courts of the district wherein such real estate is located shall have jurisdiction of proceedings for such condemnation, *and it shall be the duty of the Attorney General of the United States*, upon every application of the Secretary of the Treasury, under this act, or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from the receipt of the application at the Department of Justice.

Sec. 2. The practice, pleadings, forms and modes of proceeding in causes arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such Circuit or District courts are held, any rule of the court to the contrary notwithstanding.

Approved, August 1, 1888. (25 Stat. 357.)

fortifications thereon for the use of the United States, he is performing his official duties as District Attorney of the United States, and is not entitled to any extra or special compensation for them.

THE case is stated in the opinion.

Mr. Assistant Attorney General Boyd for the United States.

Mr. Jesse Johnson in person for Johnson.

MR. JUSTICE HARLAN delivered the opinion of the court.

In the Circuit Court of the United States for the Eastern District of New York a judgment was rendered against the Government and in favor of the defendant in error Johnson for the sum of $6513.95. Of that amount $6500 represented the value of legal services rendered for the United States by Johnson, while he held the office of District Attorney for that district in proceedings in that court for the condemnation of certain lands for public purposes.

The case having been carried by writ of error to the Circuit Court of Appeals, certain questions of law arose as to which instructions are desired from this court — the controlling question being whether Johnson was entitled, for the services rendered, to any compensation beyond the salary and emoluments attached to his office.

The sections of the Revised Statutes (Title XIII, c. 16) upon the construction of which the answers to the questions propounded more or less depend are the following:

"SEC. 355. No public money shall be expended upon any site or land purchased by the United States for the purpose of erecting thereon any armory, arsenal, fort, fortification, navy-yard, customhouse, lighthouse or other public building, of any kind whatever, until the written opinion of the Attorney General shall be had in favor of the validity of the title, nor until the consent of the legislature of the State in which the land or site may be, to such purchase, has been given. The District Attorneys of the United States, upon the application

of the Attorney General, shall furnish any assistance or information in their power in relation to the titles of the public property lying within their respective districts. And the Secretaries of the Departments, upon the application of the Attorney General, shall procure any additional evidence of title which may be deemed necessary, and which may not be in possession of the officers of the Government, and the expense of procuring it shall be paid out of the appropriations made for the contingencies of the Departments respectively."

"SEC. 767. There shall be appointed in each District, except in the Middle District of Alabama, and the Northern District of Georgia, and the Western District of South Carolina, a person learned in the law, to act as Attorney for the United States in such District. . . ."

"SEC. 770. The District Attorney for the Southern District of New York is entitled to receive quarterly for all his services a salary at the rate of six thousand dollars a year. For extra services the District Attorney for the District of California is entitled to receive a salary at the rate of five hundred dollars a year, and the District Attorneys *for all other districts* at the rate of two hundred dollars a year.

"SEC. 771. It shall be the *duty of every District Attorney* to prosecute in his district all delinquents for crimes and offences cognizable under the authority of the United States, and *all civil actions in which the United States are concerned*, and, unless otherwise instructed by the Secretary of the Treasury, to appear in behalf of the defendants in all suits or proceedings pending in his district against collectors, or other officers of the revenue, for any act done by them or for the recovery of any money exacted by or paid to such officers and by them paid into the Treasury."

"SEC. 823. The following *and no other compensation* shall be taxed and allowed to attorneys, solicitors and proctors in the courts of the United States, *to District Attorneys*, clerks of the Circuit and District Courts, marshals, commissioners, witnesses, jurors and printers in the several States and Territories, except in cases otherwise expressly provided by law. But nothing herein shall be construed to prohibit attorneys, solici-

tors and proctors from charging to and receiving from their clients, other than the Government, such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties.

"SEC. 824. . . . For examination by a District Attorney, before a Judge or commissioner, of persons charged with crime, five dollars a day for the time necessarily employed. *For each day of his necessary attendance in a court of the United States on the business of the United States*, when the court is held at the place of his abode, five dollars; and for his attendance when the court is held elsewhere, five dollars for each day of the term. . . .

"SEC. 825. There shall be taxed and paid to every District Attorney two per centum upon all moneys collected or realized in any suit or proceeding arising under the revenue laws, and conducted by him, in which the United States is a party, which shall be in lieu of all costs and fees in such proceeding."

"SEC. 827. When a District Attorney appears by direction of the Secretary or Solicitor of the Treasury, on behalf of any officer of the revenue in any suit against such officer, for any act done by him, or for the recovery of any money received by him and paid into the Treasury in the performance of his official duty, he shall receive such compensation as may be certified to be proper by the court in which the suit is brought, and approved by the Secretary of the Treasury."

"SEC. 833. Every District Attorney, clerk of a District Court, clerk of a Circuit Court, and marshal, shall, on the first days of January and July, in each year, or within thirty days thereafter, make to the Attorney General, in such form as he may prescribe, a written return for the half year ending on said days, respectively, of all the fees and emoluments of his office, of every name and character, and of all the necessary expenses of his office, including necessary clerk hire, together with the vouchers for the payment of the same for such last half year. He shall state separately in such returns the fees and emoluments received or payable under the bankrupt act; and every marshal shall state separately therein the fees and emoluments

received or payable for services rendered by himself personally, those received or payable for services rendered by each of his deputies, naming him, and the proportion of such fees and emoluments which, by the terms of his service, each deputy is to receive. Said returns shall be verified by the oath of the officer making them.

"SEC. 834. The preceding section shall not apply to the fees and compensation allowed to District Attorneys by sections eight hundred and twenty-five and eight hundred and twenty-seven. All other fees, charges and emoluments to which a District Attorney or a marshal may be entitled by reason of the discharge of the duties of his office, as now or hereafter prescribed by law, or in any case in which the United States will be bound by the judgment rendered therein, whether prescribed by statute or allowed by a court, or any judge thereof, shall be included in the semi-annual return required of said officers by the preceding section.

"SEC. 835. No District Attorney shall be allowed by the Attorney General to retain of the fees and emoluments of his office which he is required to include in his semi-annual return, for his personal compensation, over and above the necessary expenses of his office, including necessary clerk hire, to be audited and allowed by the proper accounting officers of the Treasury Department, *a sum exceeding six thousand dollars a year*, or exceeding that rate for any time less than a year."

"SEC. 844. Every District Attorney, clerk and marshal shall, at the time of making his half-yearly return to the Attorney General, pay into the Treasury, or deposit to the credit of the Treasurer, as he may be directed by the Attorney General, any surplus of the fees and emoluments of his office, which said return shows to exist over and above the compensation and allowances authorized by law to be retained by him."

"SEC. 1764. No allowance or compensation shall be made to any officer or clerk, by reason of the discharge of duties which belong to any other officer or clerk in the same or any other Department; *and no allowance or compensation shall be made for any extra services whatever, which any officer* or clerk *may be required to perform, unless expressly authorized by law.*

"SEC. 1765. *No officer in any branch of the public service*, or any other person whose salary, pay or emoluments are fixed by law or regulations, shall receive *any additional pay, extra allowance or compensation*, in any form whatever, for the disbursement of public money, *or for any other service or duty whatever unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance or compensation.*"

By section 3 of the act of June 20, 1874, c. 328, 18 Stat. 85, 109, it was provided that "*no civil officer of the Government* shall hereafter receive any compensation or perquisites, directly or indirectly, from the Treasury or property of the United States *beyond his salary or compensation allowed by law: Provided*, That this shall not be construed to prevent the employment and payment by the Department of Justice of District Attorneys as now allowed by law for the performance of services *not covered by their salaries or fees.*"

The facts to be considered in connection with these statutory provisions are set forth in a statement accompanying the certificate of questions. They may be thus summarized:

By the fortification act of August 18, 1890, c. 797, 26 Stat. 315, 316, appropriations were made for gun and mortar batteries, as follows: "For construction of gun and mortar batteries for defence of Boston Harbor, two hundred and thirty-five thousand dollars; New York, seven hundred and twenty-six thousand dollars; San Francisco, two hundred and sixty thousand dollars."

The same act contained the following provision: "For the procurement of land, or right pertaining thereto, needed for the site, location, construction or prosecution of works for fortifications and coast defences, five hundred thousand dollars, or so much thereof as may be necessary, and hereafter the Secretary of War may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings, for the acquirement by condemnation of any land, or right pertaining thereto, needed for the site, location, construction or prosecution of works for fortifications and coast defences, such proceedings to be prosecuted in accord-

ance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: *Provided*, That when the owner of such land or rights pertaining thereto shall fix a price for the same, which in the opinion of the Secretary of War shall be reasonable, he may purchase the same at such price without further delay: *Provided further*, That the Secretary of War is hereby authorized to accept on behalf of the United States donations of land, or rights pertaining thereto, required for the above-mentioned purposes: *And provided further*, That nothing herein contained shall be construed to authorize an expenditure, or to involve the Government in any contracts for the future payment of money, in excess of the sums appropriated therefor."

By the subsequent act of July 23, 1892, c. 233, 27 Stat. 257, 258, five hundred thousand dollars, or so much thereof as was necessary, was appropriated "for the procurement of land, or right pertaining thereto, needed for the site, location, construction or prosecution of work for fortifications and coast defences."

In the year 1891, at the special written request of the Secretary of War, Johnson, being then United States District Attorney for the Eastern District of New York, was instructed by the Attorney General of the United States to institute proceedings on behalf of the Government of the United States for the condemnation for a mortar battery of certain lands on Staten Island, New York, adjacent to Fort Wadsworth in that district. With such instructions the Attorney General enclosed a copy of the Secretary's request, and stated that he acted agreeably thereto.

Proceeding under the above employment in the name of the Government of the United States, Johnson took steps to acquire such lands by proceedings for their condemnation, and obtained decrees against the persons interested in them. In order to carry on such proceedings it was necessary that he should search and ascertain, and he did search and ascertain, the titles to the lands sought to be condemned. After rendering these services, he presented two bills against the Government, which were approved and allowed by the Attor-

UNITED STATES *v.* JOHNSON.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 59. Submitted November 10, 1898. — Decided February 27, 1899.

In proceedings taken by a District Attorney of the United States, by order of the Attorney General at the request of the Secretary of War, and conducted under directions of the latter, to secure the condemnation of private lands within the limits of his district for the purpose of erecting

ney General, one being for $4000, and the other for $2500. These services were rendered by him in 1892 and were worth those sums respectively.

In the statement that accompanies the questions certified it is said that for many years before 1892, and for many years prior to Johnson's employment, it was the custom and usage of the Government to pay to District Attorneys, under like employment and for like services, compensation outside of their annual salaries as fixed by statute at the sum of two hundred dollars.

Johnson had received from the United States for services (other than those above mentioned) rendered for the Government in the year 1892, either as District Attorney or under employment or directions of the Attorney General, the sum of $2250.

In 1891 he rendered services to the Government in and about the acquisition of other lands in his district by condemnation proceedings. These services were rendered under employment similar to that above stated in acquiring lands for like purposes. For the services thus rendered in 1891 he was paid by the Government a sum exceeding six thousand dollars. He had also been paid for other services rendered to the Government in 1891 further and additional sums. The aggregate so paid for services in 1891 exceeded six thousand dollars by a sum which, together with the amounts paid to him as above stated for services rendered in 1892, equalled the sum of six thousand dollars. Such excess over six thousand dollars existed and appeared after crediting and allowing on the sums so received by him the necessary expenses of his office, including the necessary clerk hire, as audited and allowed to him in the years 1891 and 1892.

After the services rendered in 1892, and after the above sum of six thousand five hundred dollars had been allowed by the Attorney General as stated, the accounting officers of the United States caused a warrant on funds appropriated for the War Department to be drawn for the sum of six thousand five hundred dollars and "conveyed into the Treasury of the United States." That warrant "was drawn and conveyed"

against and in payment of the amount which Johnson, for services rendered in 1891, had been paid in excess of the maximum fixed by section 835 of the Revised Statutes. Such conveyance and application were made by the Government without his consent, and except as above stated his claim for six thousand five hundred dollars has not been allowed or paid.

After the above services were rendered in 1892, Johnson requested that the amounts so allowed be paid by the officers of the Treasury, but those officers refused to audit or allow his bills or any part of the same except as above stated, and refused to allow or pay to him any part of the same.

Upon the trial in the Circuit Court it was admitted that the expense account of Johnson was $1018.23, which was allowed by the Attorney General; that if the amounts he received for services in obtaining lands in said district (which services were similar in nature, employment, etc., to those here claimed for) are to be computed as part of the amount limited by section 835 of the Revised Statutes, then he had received in excess of the amount so limited for the year 1891 a sum which, added to the amounts received by him for the year 1892, (and which are fees and emoluments referred to by section 835 of the Revised Statutes,) equalled the sum of six thousand dollars and the legitimate office expenses of his office; and that if the services involved in this action and the other similar services stated above are to be accounted as a part of the maximum fixed by section 835 of the Revised Statutes, and if the Government, having paid him for one year in excess of such maximum, has the right to recoup, set off or counterclaim such overpayment against an amount otherwise due, then Johnson had no cause of action as set forth in his present suit.

The Circuit Court of Appeals desires information upon the following questions of law arising out of the above facts:

1. Whether Johnson is entitled to be paid the said sum of six thousand five hundred dollars for the services rendered by him in the year 1892? This question is submitted without reference to the provisions of section 835 of the Revised Statutes.

2. Whether, if the first question be answered in the affirmative, such compensation should be included in the fees and emoluments of claimant's office within the meaning of sections 834, 835 and 844 of the Revised Statutes.

3. Whether, if both of the above questions are answered in the affirmative, the Government of the United States can, under the circumstances stated, apply the six thousand five hundred dollars as such sum was applied, on account of the payments made by the United States for services rendered by Johnson in the year 1891.

The Government contends that the services in question were such as the law required the District Attorney to render, and consequently that he could receive no special compensation therefor.

In support of this proposition the Assistant Attorney General refers to *Gibson* v. *Peters*, 150 U. S. 342, 347. That was an action against the receiver of a national bank to recover the value of legal services alleged to have been rendered or offered to be rendered by a District Attorney of the United States in a suit brought in the name of the receiver against one McDonald. In its opinion in that case this court referred to section 380 of the Revised Statutes providing that "all suits and proceedings arising out of the provisions of law governing national banking associations, in which the United States or any of its officers or agents shall be parties, shall be conducted by the District Attorneys of the several districts under the direction and supervision of the Solicitor of the Treasury," and observed that the suit against McDonald was one embraced by that section, and that the receiver was, within its meaning, an officer and agent of the United States.

After referring also to sections 770, 823 to 827 inclusive, 1764 and 1765, the court said: "It ought not to be difficult under any reasonable construction of these statutory provisions to ascertain the intention of Congress. A distinct provision is made for the salary of a District Attorney, and he cannot receive, on that account, any more than the statute prescribes. But the statute is equally explicit in declaring, in respect to compensation that may be 'taxed and allowed,' that he shall

receive no other than that specified in sections 823 to 827 inclusive, 'except in cases otherwise expressly provided by law.' It also declares that no officer in any branch of the public service shall receive any additional pay, extra allowance or compensation, in any form whatever, for any service or duty, unless the same is expressly authorized by law, or unless the appropriation therefor explicitly states that it is for such additional pay, extra allowance or compensation. No room is left here for construction. It is not expressly provided by law that a District Attorney shall receive compensation for services performed by him in conducting suits arising out of the provisions of the national banking law in which the United States or any of its officers or agents are parties. Without such express provision, compensation for services of that character cannot be taxed, allowed or paid. Nor can the expenses of the receivership be held to include compensation to the District Attorney for conducting a suit in which the receiver is a party, for the obvious reason that the statute does not expressly provide compensation for such services. Congress evidently intended to require the performance by a District Attorney of all the duties imposed upon him by law, without any other remuneration than that coming from his salary, from the compensation or fees authorized to be taxed and allowed, and from such other compensation as is expressly allowed by law specifically on account of services named. Nothing in the last clause of section 823 militates against this view. On the contrary, the proper interpretation of that clause supports the conclusion we have reached. Its principal object was to make it clear that Congress did not intend to prohibit attorneys, solicitors and proctors, representing individuals in the courts of the United States, from charging and receiving, in addition to taxable fees and allowances, such compensation as was reasonable under local usage, or such as was agreed upon between them and their clients. But to prevent the application of that rule to the United States, the words 'other than the Government' were inserted. The introduction of those words in that clause emphasizes the purpose not to subject the United States to any system for compen-

sating District Attorneys except that expressly established by Congress, and, therefore, to withhold from them any compensation for extra or special services, rendered in their official capacity, which is not expressly authorized by statute. Whatever legal services were rendered or offered to be rendered by the plaintiff in the McDonald suit were rendered or offered to be rendered by him as United States District Attorney, and in that capacity alone. As such officer he is not entitled to demand compensation for the services so rendered or offered to be rendered."

The full scope of the decision in *Gibson* v. *Peters* is shown by this extract from the opinion in that case. The point in judgment was that the services rendered by Gibson were in discharge of duties imposed upon him by law in relation to suits of a particular kind, and as no statute made provision for additional or special compensation for such services, his claim against the United States for extra pay could not be allowed.

In *United States* v. *Winston*, 170 U. S. 522, 525, which involved the question whether the District Attorney of the United States for the District of Washington could be allowed special compensation for services rendered by direction or at the instance of the Attorney General in a case in the Circuit Court of Appeals for the Ninth Circuit sitting at San Francisco, it was held that the duties of the claimant as District Attorney of the United States were limited by the boundaries of his district; and that while he was required to discharge all his official duties within those boundaries, he was not required to go beyond them. The court said: "Whenever the Attorney General calls upon a District Attorney to appear for the Government in a case pending in the Court of Appeals, he is not directing him in the discharge of his official duties as District Attorney, but is employing him as special counsel. The duties so performed are not performed by him as District Attorney, but by virtue of the special designation and employment by the Attorney General, and the compensation which he may receive is not a part of his compensation as District Attorney or limited by the maximum prescribed

therefor. It seems to us that this is the clear import of the statutes, and we have no difficulty in agreeing with the Court of Appeals in its opinion upon this question."

In *Ruhm* v. *United States*, 66 Fed. Rep. 531, 532, it was held that as it is the duty of a District Attorney to prosecute in his district all civil actions in which the United States are concerned, he is not entitled to extra compensation for conducting a suit to recover pension money fraudulently secured.

The controlling question, therefore, in the present case is, whether Johnson was under a duty imposed upon him as District Attorney to perform the services for which he here claims special compensation. If such was his duty as defined by law, then he is forbidden by statute from receiving any special compensation on account of such services — this, for the reason that no appropriation for such compensation has been made by any statute explicitly stating that it was for such additional pay, extra allowance or compensation. §§ 1764, 1765. On the other hand, if his duties as District Attorney did not embrace such services as he rendered, and for which he here claims special compensation, then he is entitled to be paid therefor without reference to the regular salary, pay or emoluments attached to his office.

What relations did the District Attorney have, by virtue of his office, with the proceedings instituted in his district for the condemnation of land under the act of 1890 relating to gun and mortar batteries for the defence of New York? That act authorized the Secretary to cause condemnation proceedings to be instituted, in the name of the United States — such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property in the States wherein the proceedings were instituted. The application of the Secretary to the Attorney General was doubtless made under the provisions of the act of August 1, 1888, c. 728, 25 Stat. 357, providing that in every case in which the Secretary of the Treasury, "or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he shall be, and hereby is, authorized to acquire the same for

the United States by condemnation under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the United States Circuit or District Courts of the district wherein such real estate is located shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this act, or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from the receipt of the application at the Department of Justice." By the same act it was provided that "the practice, pleadings, forms and modes of proceeding in causes arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such Circuit or District Courts are held, any rule of the court to the contrary notwithstanding."

This statute being in force, the Attorney General directed the defendant in error as District Attorney to institute on behalf of the Government the condemnation proceedings desired by the Secretary of War. It was of course not contemplated by Congress that the Attorney General should be away from the National Capital in order to give his personal attention to the conduct of such proceedings. He therefore directed the District Attorney of the district in which the lands were situated to institute and prosecute the required proceedings. Could the District Attorney have declined to represent the United States in such proceedings upon the ground that he was not required by law to do so in his official capacity? The answer to that question depends upon the construction to be given to section 771 of the Revised Statutes which defines generally the duties of District Attorneys. That section, as we have seen, makes it the duty of every District Attorney to prosecute in his district, not only all crimes and offences cognizable under the authority of the United States, but "all civil actions in which the United States are concerned." We are of opinion that within the reasonable meaning of that section the proceedings instituted in the Federal court by Dis-

trict Attorney Johnson to condemn the lands in question for the benefit of the United States constituted a civil action in which the Government was concerned; and that in following the directions of the Attorney General to institute such proceedings and have the lands referred to condemned for the United States, he was only discharging an official duty imposed upon him by statute. It would involve a very narrow construction of section 771 to hold that judicial proceedings in a court of the United States to condemn lands for the use of the Government were not civil actions in which the United States was concerned. We think that when he attended court in the prosecution of those proceedings he was, within the meaning of section 824, "on the business of the United States."

Under the interpretation placed by us upon sections 771 and 824, it results that according to the principle announced in *Gibson* v. *Peters* the defendant in error having been under a duty to represent the United States in the condemnation proceedings referred to, and there being no statute explicitly allowing him extra compensation for the services rendered by him in and about those proceedings, his present claim must be disallowed.

This conclusion it is contended is not consistent with the usage and custom which has obtained in the Executive Departments of the Government for many years prior to the year 1892. How long such usage or custom prevailed, upon what specific grounds it rested, and in what way it is evidenced, does not appear from the statement of facts accompanying the certificate of questions. The opinions of Attorneys General to which our attention has been called by counsel certainly do not cover the precise question now before us. Some of them hold that a District Attorney is entitled to special compensation for representing the interests of the United States in suits in state courts — services in such courts not being required by the statutes regulating his official duties. That is a question not involved in the present case. We perceive no reason for holding that there has been any such long-continued practical interpretation by the Executive Depart-

ments of the Government of sections 1764 and 1765 of the Revised Statutes, brought forward from the acts of March 3, 1839, c. 82, 5 Stat. 337, 349, § 3; August 23, 1842, c. 183, 5 Stat. 510, § 2; and August 26, 1842, c. 202, 5 Stat. 525, § 12; as to justify this court in departing in any degree from such an interpretation of those sections as is required by the obvious import of the words found in them. Such a practice may be resorted to in aid of interpretation, but it cannot be recognized as controlling when the statute to be interpreted is clear and explicit in its language and its meaning not doubtful. *United States* v. *Graham*, 110 U. S. 219, 221; *United States* v. *Healey*, 160 U. S. 136, 141.

It may, however, be observed that some of the opinions of Attorneys General rest upon rules of construction that forbid the allowance of the claim of the defendant in error. In 1855, special or extra compensation was claimed by a District Attorney for services rendered under employment by the Navy Department in a certain case in a Circuit Court of the United States in which the Government was a party. Attorney General Cushing referred to the act of February 26, 1853, regulating "the fees and costs to be allowed clerks, marshals and attorneys of the Circuit and District Courts of the United States, and for other purposes." 10 Stat. 161, c. 80. That act declared, among other things, that in lieu of the compensation then allowed to the officers named, no other compensation should be taxed and allowed. It also established for District Attorneys a fee for each day "of his necessary attendance in a court of the United States on the business of the United States." The provisions of the act of 1853 have been preserved in Chapter sixteen of Title XIII of the Revised Statutes. After referring to some former opinions given by him, Mr. Cushing said: "But in a matter like that now before me, which is of the direct official business of a District Attorney in the court of the United States for his district, which is of the very class of business for which the act of 1853 expressly and in plain terms provides, and as to which any other compensation is emphatically excluded by the strong terms of that act, it does not appear to me that

any extra or special compensation can be lawfully paid to the District Attorney. Nor, in my judgment, is the case taken out of the general rule by the fact that the suit concerns immediately the business of the Navy Department, and has been the subject of instructions from the Secretary of the Navy. All the civil business of the Government concerns some one of its Departments, and may require the attention of its Head. It cannot be that a suit in the name of the United States, pending in the District or Circuit Court, is out of the scope of the regular duty of a District Attorney because of its arising in the business of the Navy Department rather than the Treasury or any other Department; nor that in such a case the service of the District Attorney becomes that of counsel specially retained by the Department. This latter enactment must have been designed, it seems to me, for contingencies, where a Head of Department needs professional services in a case not provided for by the particular terms of the law, and the special compensation to a District Attorney for the performance of such a service must depend on that fact, not on the fact that he has been instructed by the Head of the Department. A contrary construction would lay the foundation for extra compensation to District Attorneys in almost every case in which they appear in civil actions in which the United States are concerned." 7 Op. 84, 86.

At a later date, May 25, 1858, Attorney General Black had before him an application for special allowance to a District Attorney for services rendered by him. The claim, he said, involved three questions, the first of which was: Can the District Attorney, in any case, charge more for his services than the fee-bill expressly allows? He said: "The first question does not, for a moment, admit of any other reply than a direct negative: the District Attorney can receive such compensation, and such only, as the fee-bill gives. This is not only the general policy of the Government, but it is expressly declared to be the will of Congress by the act of 1853. When, therefore, a District Attorney makes a charge against the Treasury for services, he must support it by showing some clause in the fee-bill which authorizes him to receive what he

claims. When a duty is enjoined upon him by the law of his office and not merely by the request of a Department, he is bound to perform it and take as compensation what the law gives him. That is his contract; and if it be a bad one for him he has no remedy but resignation. The subject is not open to a new bargain between him and any other officer of the Government. All criminal prosecutions and all civil suits in which the United States are a party of record fall within this principle. In them no charge for extra services can be legally allowed, though it be true that some of them require an amount of labor and skill for which the compensation allowed by the fee-bill is altogether inadequate. I cannot make out, in any way satisfactory to my own mind, the ingenious distinction which would pay the officer as attorney what the fee-bill gives, and then pay him besides a *quantum meruit* for managing the same case as counsel." 9 Op. 146, 147.

In an opinion rendered March 13, 1888, Attorney General Garland, upon an extended review of the adjudged cases, said: "From these authorities it may be derived that the elements necessary to justify the payment of compensation to an officer for additional services are, that they shall be performed by virtue of a separate and distinct appointment authorized by law; that such services shall not be services added to or connected with the regular duties of the place he holds; and that a compensation, whose amount is fixed by law or regulation, shall be provided for their payment." 19 Op. 121, 125, 126.

The same views were expressed by the Second Comptroller of the Treasury in an opinion delivered by him as late as 1893 in *Earhart's case*. Cousar's Dig. 12.

We are of opinion that Congress intended by sections 1764 and 1765 to uproot the practice under which, in the absence of any statute expressly authorizing it, extra allowances or special compensation were made to public officers for services which they were required to render in consideration only of the fixed salary and emoluments established for them by law. Our duty is to give effect to the legislation of Congress, and not to defeat it by an interpretation plainly inconsistent with the words used.

Syllabus.

The conclusion is that as the defendant in error was under a duty as District Attorney to represent the United States in the condemnation proceedings referred to (§ 771); as his attendance in court on those proceedings was on the business of the United States (§ 824); as no statute provides for extra or special compensation for services of that character; and as the existing statutes declare that no officer in any branch of the public service shall directly or indirectly, or in any form whatever, receive from the Treasury of the United States any additional pay, extra allowance or compensation, unless the same be authorized by law and the appropriation therefor expressly states that it is for such additional pay, extra allowance or compensation, Rev. Stat. §§ 1764, 1765, act of June 20, 1874, c. 328, the claim of the defendant in error must be rejected, and judgment rendered for the United States.

For the reasons stated the first question is answered in the negative; and under the certificate the answer to the other questions becomes both unnecessary and immaterial. It will be so certified.

MR. JUSTICE SHIRAS and MR. JUSTICE PECKHAM dissented.